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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1138

JACK HENSLEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JAMES R. KIRKLAND,
M. EDWARD BUCKLEY,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petitioner, Jack Hensley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered February 10, 1947 (R. 64) affirming petitioner's conviction for unlawful possession of marihuana under Title 26 U. S. C. A. Section 2593, Marihuana Tax Act of 1937.

Opinion Below

The opinion in the Court of Appeals is not yet reported, but is set out in full in the Record at page 64.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 A of the Judicial Code as Amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347) and Sec. 269, as

amended (28 U. S. C. A. 391). See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Question Presented

The Court erred in omitting to rule that an incarceration in the penitentiary, following a plea of guilty in a Federal Court, and service therein for twenty-seven days, divested the Court of power to vacate the commitment and permit the Government to proceed with a new indictment, based upon two counts of the first indictment, which had been *nolle prossed* by the Government at the time of the imposition of the original sentence.

Statutes Involved

Marihuana Tax Act of August 2, 1937, Title 26, U. S. C. A. Sec. 2593:

> "2593. Unlawful possession.
>
> (a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by the section 2590 (a).

Statement

Petitioner was indicted December 21, 1942, in Criminal Case No. 71,133 (App. 3) in the October Term, 1942. He was sentenced on June 4, 1943, following a plea of guilty to the third count thereof charging unlawful possession on November 4, 1942 of 125 grains of marihuana. The first

count, charging an unlawful transfer of 48 ounces of marihuana on October 30, 1942, to narcotic agent Benjamin Groff, and the second count charging an unlawful transfer of marihuana to the said narcotic agent Benjamin Groff on November 4, 1942, consisting of 940 cigarettes and 48 ounces of marihuana were *nolle prossed* by the Government. *Thereafter, and over his objection, the trial court, on July 1, 1943, after the appellant had served twenty-seven days of imprisonment, vacated the order and on the motion of Government counsel, the third count of the indictment was dismissed, and exception thereto was duly noted.* This important fact was apparently overlooked in the opinion rendered by the United States Court of Appeals.

Later, indictment No. 72,270 was returned in the July Term, 1943 (App. 9), and contained eight counts. The first count charged that on October 30, 1942, the defendant had transferred to the same narcotic agent, Benjamin Groff, the same 48 ounces of marihuana; in the second count that he was an unauthorized transferee of the said 48 ounces of marihuana; in the third count that he was on the same date a person who had unlawfully failed to register with the *Collector of Internal Revenue for the District of Columbia* (Italics supplied) and without having paid a special tax required by Sec. 3234(a) of the Internal Revenue Code; and the fourth count charged that on the same date he had failed to pay the special tax and to register as required, and had unlawfully delivered 48 ounces of marihuana. The succeeding fifth, sixth, seventh and eighth counts charged similar offenses on the fourth day of November, 1942, and involved the same narcotic agent, as well as the same 940 cigarettes and 48 ounces of marihuana.

A Government bill of particulars limited the proof on the third and seventh counts of the second indictment to allegations of sales. The question of former jeopardy was raised (App. 18, 21, 26). By demurrer, the appellant successfully

vacated the third and seventh counts of the indictment by virtue of the fact that the proper person with whom registration under the Act was to be made was the Deputy Collector of Internal Revenue for the District of Maryland. The trial Court, over the objection of appellant, permitted the Government to offer testimony of the seizure at his home, under a search warrant, of 125 grains of marihuana, measuring scales, and some cigarette papers in the absence of a count in the indictment, covering such seizure and which had formerly been the basis of the third count of the first indictment on which the appellant had entered a plea of guilty and had been committed to the penitentiary. Judgments of acquittal on the second and sixth counts were granted to the appellant on his motion at the close of the Government's case (App. 27). The prosecutor's requests to the Court to dismiss counts four and eight in the indictment and to strike out the evidence obtained as a result of the search of defendant's home were granted.

On the remaining first and fifth counts of the indictment, which charged unlawful transfer of marihuana on October 30, 1942, and November 4, 1942, on which Deputy Collector of Internal Revenue Andrew J. Clarke did not make a demand for the official transfer forms of appellant until April 17, 1944, the jury returned verdicts of guilty. This action occurred approximately three years after the second indictment and almost four years after the offenses were committed. The Government's testimony tended to prove the allegations of the indictment, and the appellant stood upon his legal rights and did not testify in the case.

Appellant's motion for a new trial and/or arrest in judgment (App. 32) was overruled. He was sentenced to a term of one to three years on the first count and a similar sentence on the fifth count to run concurrently, which was the exact sentence imposed on him by the Court in the first indictment, after which the present appeal was instituted.

Reasons for Granting the Writ

The major contention of the petitioner is that his twenty-seven days of service under a valid commitment divested the trial court of its jurisdiction, over petitioner's objection, to arbitrarily vacate the judgment. Since jeopardy attached when his sentence was imposed and his service began, his subsequent conviction for the transactions covered by those counts of the first indictment, which were *nolle prossed* by the prosecutor, which action was inextricably associated with his plea of guilty, constituted double jeopardy under the Fifth Amendment of the Constitution.

Speaking for a unanimous court, Chief Justice Taft stated the applicable rule in *United States* v. *Murray* (1927), 275 U. S. 347, 72 L. Ed. 309, 48 S. Ct. 146, as follows:

> "The beginning of the service of a sentence in a criminal case ends the power of the court, even in the same term, to change it. • • • It is true there was but one day of execution of the sentence in the Murray case, but the power passed immediately after imprisonment began and there had been one day of it served."

See also *Ex Parte Lange,* 18 Wall. 163, 21 L. Ed. 872.

The rule was also announced in *Stewart* v. *United States* (1924), 300 F. 769, as follows:

> "An examination of the authorities leaves no doubt that the established rule is that courts have the jurisdiction and authority, during the term in which their orders, judgments, and decrees are made, to set them aside and substitute others for them, or to amend or otherwise modify them, until or unless they have been executed in whole or part, or the rights of third parties will be injured by such action, and cases in which pleas of nolle contendere have been filed and accepted by the court are not exceptions to this rule. See *Basset* v. *U. S.,* 9 Wall. (76 U. S.) 38, 39, 41, 19 L. Ed. 548; *Tiberg* v. *Warren,* 192 F. 458, 460, 461, 463, 112 C. C. A.

596; *Ex Parte Lange,* 18 Wall. (85 U. S.) 163, 167, 21 L. Ed. 872; *Goddard* v. *Ordway,* 101 U. S. 745, 752, 25 L. Ed. 1040; *Bronson* v. *Schulten,* 104 U. S. 410, 415, 26 L. Ed. 797; *Aetna Life Ins. Co.* v. *Board of County Com'rs.,* 79 F. 575, 576, 25 C. C. A. 94."

In denying a petition for a writ of *habeas corpus,* the court, in *Yutz* v. *Pearman,* 33 F. 2d 906 (1929), sought to change a sentence after service actually began. The Court stated:

> "• • • The presiding judge who originally sentenced the prisoner, was without the power to modify or change the sentence on April 1, 1927, after the petitioner had actually commenced the service of the original sentence on February 5, 1927.
>
> "Under the authorities of *United States* v. *Murray,* and *Cook, Petitioner* v. *United States,* reported jointly in 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309; *Miller* v. *Snook* (D. C.) 15 F. 2d 68; *U. S.* v. *Howe* (C. C. A.) 280 F. 815, 23 A. L. R. 53; *U. S.* v. *Albrecht* (C. C. A.) 25 F. 2d 93; *Archer* v. *Snook* (D. C.) 10 F. 2d 567; *Stewart* v. *U. S.* (C. C. A.) 300 F. 769; the application of the prisoner must be denied."

In *Hynes* v. *United States,* (C. C. A. 7), 35 F. 2d 734 (1929), the Court sought to change the sentence, and it was held:

> "In criminal cases where sentence is valid and the defendant has commenced the service of the sentence, the court thereupon loses the power over the case, even during the same term. *U. S.* v. *Murray,* 275 U. S. 347, 358, 48 S. Ct. 146, 72 L. Ed. 309; Ex parte Lange, 18 Wall. 163, 168, 21 L. Ed. 872. For a general discussion see 8 Ruling Case Law Sec. 246 et seq., p. 243; 16 Corpus Juris, Sec. 2096 et seq., p. 1313. The legality of the first sentence is not in question. Unless there is statutory provisions or provision in the judgment as entered that the service shall begin at a specified time,

service begins when the prisoner is delivered into the custody of the officer at the prison where the sentence is to be served."

The rule is universal in the Federal Courts [1] and in the State Courts.[2] In the instant case, the court was not correcting a clerical error or an ambiguous sentence (*Downey* v. *U. S.* (1937), 67 App. D. C. 192, 9 F. 2d 223); nor was it reducing a sentence so as to avoid the challenge of double jeopardy (*U. S.* v. *Benz*, 1930, 282 U. S. 304, 75 L. Ed. 354, 51 S. Ct. 113; *Bradford* v. *U. S.*, 156 F. 2d 210; *Acme Poultry Corporation* v. *U. S.*, C. C. A. 4, 1944, 146 F. 2d 738). The indictment in the first case was valid (*Cromer* v. *U. S.*, 1944, 142 F. 2d 697, Cert. denied, 64 S. Ct. 1274), and jeopardy attached when the petitioner pleaded guilty and was sentenced (*Clawans* v. *Rives*, 1939, 70 App. D. C. 107, 104 F. 2d 240). After serving twenty-seven days, to again receive a similar sentence of one to three years constitutes double jeopardy in violation of the Fifth Amendment of the Constitution.

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[1] *U. S.* v. *Howe*, 1922 (C. C. A. 2), 280 F. 815.
U. S. v. *Albrecht*, 1928 (C. C. A. 7), 25 F. 2d 93.
Cisson v. *U. S.*, 1930 (C. C. A. 4), 37 F. 2d 330.
Wall v. *Aderhold, Warden*, 1931 (D. C.), 51 F. 2d 714.
U. S. v. *Davidson*, 1931 (C. C. A. 9), 50 F. 2d 517.
Rives v. *O'Hearne*, 1934 (D. C.), 73 F. 2d 985, 64 App. D. C. 48.
Buhler v. *Hill*, 1934 (D. C.), 7 F. Supp. 857.
Trant v. *U. S.*, 1937 (C. C. A. 7), 90 F. 2d 718.
Frankel v. *U. S.*, 1942 (C. C. A. 6), 131 F. 2d 756.
U. S. v. *Wright*, 1944 (D. C.), 56 F. Supp. 489.

[2] *Com.* v. *Weymouth*, 2 Allen 144.
Brown v. *Rice*, 57 Me. 56.
People v. *Duffy*, 5 Barb. (N. Y.) 205.
In re Jones, 35 Neb. 499, 53 N. W. 468.
Rupert v. *State*, 131 Pac. 713, 90 Okla. Cir. 226.
Com. v. *Foster*, 122 Mass. 317.
Pl. v. *Kustein*, 59 Cal. App. (2) 172, 138 P. (2) 780.
St. v. *Lewis*, 226 N. C. 249, 37 S. E. (2) 691.
Pl. v. *Gilligan*, 65 N. W. S. (2) 879.

By way of analogy, the Federal Courts have consistently held that a court is without power to grant probation after the service of sentence has begun.[3]

The leading case in the District of Columbia is *Rowley* v. *Welch*, (1940), 72 App. D. C. 351, wherein a prisoner was recalled within one-half hour from the cell block of the courthouse, and prior concurrent sentences were changed to consecutive sentences. An extended and able opinion in the lower court was written by Associate Justice Rutledge of this Court. The Court in part said:

> "It is conceded that if appellant had begun to serve the sentence as originally pronounced, it was beyond the court's power to make the amendment. • • • Jeopardy exists when the court's action places the prisoner in irrevocable danger of execution of the sentence. • • • We need not determine the exact point in time which fixed the ultimate limit of the court's power to make the correction. • • • It has been suggested that the limit is reached when the prisoner passes from judicial custody for purposes of trial and sentence or possible detention preliminary to it."

Although cited in petitioner's brief, the lower court did not distinguish it in the instant case, nor comment upon its principle. Apparently the Court overlooked the involuntary nature of petitioner's position in the Court vacating the sentence, and although drawn to its attention by a petition for a rehearing, did not recede from its position. The

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[3] *Archer* v. *Snook*, 1926 (D. C.), 10 F. 2d 567.
U. S. v. *Albrecht*, 1928 (C. C. A. 7), 25 F. 2d 93.
U. S. v. *Gargano*, 1928 (D. C.), 25 F. 2d 723.
Yutz v. *Pearman*, 1929 (D. C.), 33 F. 2d 906.
Moss v. *U. S.*, 1934 (C. C. A. 4), 72 F. 2d 30.
Simmons v. *U. S.*, 1937 (C. C. A. 5), 89 F. 2d 591.
U. S. v. *Craig*, 1938 (C. C. A. 9), 95 F. 2d 202.
U. S. v. *La Shagway*, 1938 (C. C. A. 9), 95 F. 2d 200.
Peden v. *Fleming* (App. D. C. 1946), 153 F. 2d 800.

three cases cited by the Court [4] in support of its opinion on the principles of former jeopardy did not involve a situation where the defendant had been actually incarcerated in the penitentiary and had begun his service of sentence, and are not controlling.

Conclusion

Since the rule announced by the lower court transcends a practice of Federal criminal law of long standing, it would seriously affect Federal commitments. It would also endanger the entry of a *nolle prosequi* by United States attorneys where inextricably associated with a plea of guilty, and in view of the fact that the court was without jurisdiction to arbitrarily vacate its sentence after actual service had begun, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES R. KIRKLAND,
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Attorneys for Petitioner.

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[4] *Bracey* v. *Zerbst*, 1937 (C. C. A. 10), 93 F. 2d 8.
Mirchener v. *Johnston*, 1944 (C. C. A. 9), 141 F. 2d 171.
Crapo v. *Johnson* 1944 (C. C. A. 9), 144 F. 2d 863.

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PETITIONER'S REPLY BRIEF

In a footnote to Respondent's brief (p. 5), filed in opposition to the petition for certiorari, a statement is made as follows:

> "While the record is silent as to the reason for this action of the district court, we have been advised by the United States Attorney that the court concluded that count 3 did not charge an offense. That conclusion seems sound, for count 3 charged unlawful possession of marihuana without retaining the order form required by law, whereas the gist of the offense under Section 2593 (a) of the Internal Revenue Code, under which count 3 was apparently drawn, is the acquisition of marihuana without payment of the required transfer tax."

The fact of the matter is that the record is completely silent for the court's action in vacating its judgment. The

trial counsel for Petitioner has advised that he knows of no reason for the court's action, and that the Assistant United States Attorney prosecuting the case is also without such information.

The only differences between the counts of the two indictments are as follows:

"Criminal No. 72,270	"Criminal No. 71,133
Violation Marihuana Tax Act of 1937	Violation Marihuana Tax Act of 1937
July Term, A. D. 1943.	October Term, A. D. 1942.
• • •	• • •
That one Jack Hensley • • • did • • • unlawfully, fraudulently, feloniously and knowingly transfer to one Benjamin Groff, a quantity of Marihuana • • • which said transfer was not made in pursuance of a written order of the said Benjamin Groff, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, as required by Section 2591 (a) of the Internal Revenue Code."	That one Jack Hensley • • • unlawfully, feloniously, wilfully and knowingly did transfer, sell, barter, exchange and give away to one Benjamin Groff, a certain quantity of marihuana, • • • not in pursuance of a written order from the said Benjamin Groff, on a form issued in blank for that purpose by the Secretary of the United States Treasury."

Petitioner submits that the first indictment, No. 71,133, was a valid indictment. Section 2591 of the Act provides in substance that it shall be unlawful for a person to transfer marihuana except in pursuance of a written order on a form to be issued in blank by the Secretary (Secretary of the Treasury). Section 2600 permits the Secretary to delegate any of the powers and duties conferred or imposed on him, upon such officers or employees of the Treasury

Department as he shall delegate or appoint. It will be noted that in the original indictment, No. 71,133, the charge followed the specific language of the statute, and the mere fact that under his statutory powers the Secretary of the Treasury had delegated the function of supplying the requisite forms to the Collector of Internal Revenue should in no wise invalidate the indictment.

The matter has been definitely settled in the District of Columbia by the case of *Cromer* v. *United States*, 1944, 78 U. S. App. D. C. 400, 142 F. (2d) 697, Cert. denied 322 U. S. 760, 64 S. Ct. 1274, 88 L. Ed. 1588, wherein an indictment had alleged that the written order in a narcotic case should have been issued on a form for that purpose by the Commissioner of Internal Revenue, whereas the authority in fact was vested in the Commissioner of Narcotics. In sustaining the indictment, the Court said:

> "There is no possibility that the defendant did not know the nature and character of the offense charged, or that he was misled or handicapped in preparing his defense by the alleged misdescription of the Treasury subordinate authorized to issue the narcotic order. There is also no possibility that the alleged erroneous description could subject the appellant to another trial for the same offense. We think that the principle applied in *Berger* v. *United States* with respect to a variance between the indictment and proof is equally applicable to a technical error in the indictment, and that some actual prejudice to the defendant would have to be shown in order to justify reversal of a conviction on the ground of such an error."

To like effect are the cases of *Ainsworth* v. *Sanford*, 104 F. (2d) 96 (1939) and *Czarnecki* v. *United States* (C. C. A. N. J. 1938) 95 F. (2d) 32.

Not only did the first indictment strictly follow the statute, but the defendant interposed no objection to its form and was not prejudiced by its designation therein of the

Secretary of the Treasury. It is evident that the indictment referred to the same line of authority and this was apparent to the petitioner. See also *Nordlinger* v. *United States* (1904) 24 App. D. C. 406.

Conclusion

The petition for certiorari should be granted because, if the ruling below is established as future Federal criminal procedure, the professional integrity of Federal prosecutors would be impugned, defense counsel would be unable to rely upon promises to *nolle prosse* counts of an indictment inextricably associated with a plea of guilty, and the defendant's service of sentence would be unsettled and subject to double punishment for the same offense.

Respectfully submitted,

James R. Kirkland,
M. Edward Buckley, Jr.,
Attorneys for Petitioner.

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In the Supreme Court of the United States

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JACK HENSLEY, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 64–65) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 10, 1947 (R. 66), and a petition for rehearing (R. 67–69) was denied February 19, 1947 (R. 69). The petition for a writ of certiorari was filed March 18, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

A three-count indictment charged petitioner with certain narcotics violations. After he pleaded guilty to count 3 and was sentenced thereon, the United States Attorney *nolle prossed* counts 1 and 2, which charged distinct offenses. The question presented is whether reindictment and prosecution for the offenses charged in counts 1 and 2 constitutes double jeopardy.

STATUTE INVOLVED

The Marihuana Tax Act of 1937, as re-enacted in the Internal Revenue Code, provides in pertinent part:

> § 2591. Order forms.
>
> (a) General requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred on a form to be issued in blank for that purpose by the Secretary.
>
> * * * * *
>
> § 2593. Unlawful possession.
>
> (a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable no-

tice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by the section 2590 (a).

STATEMENT

On December 21, 1942, an indictment in three counts was returned in the District Court for the District of Columbia, charging petitioner with violations of the Marihuana Tax Act of 1937 (R. 3–4, 9). Count 1 charged that petitioner unlawfully sold 48 ounces of marihuana to Benjamin Groff on October 30, 1942, without a written order from Groff on a form issued in blank for that purpose by the Secretary of Treasury (R. 3). Count 2 charged a similar violation in respect of a sale of 940 cigarets and 48 ounces of marihuana to Groff on November 4, 1942 (R. 3–4). See § 2591 (a), I. R. C., *supra*. Count 3 charged that on November 4, 1942, petitioner unlawfully had in his possession 125 grains of marihuana and then and there failed to produce the order form required by law to be retained by him (R. 4). See § 2593 (a), I. R. C., *supra*. Petitioner, who was represented by counsel, pleaded guilty to count 3 (R. 5–6, 9), and he was sentenced, on June 4, 1943, to imprisonment for a period of from one to three years (R. 5, 6, 9). Thereupon the United States Attorney *nolle prossed* counts 1 and 2 of the indictment (R. 5).

On June 4, 1943, petitioner was delivered to the institution which had been designated for his confinement (R. 6). Thereafter, on July 1, 1943, on the district court's own motion, the judgment of June 4, 1943, was vacated (R. 8, 9) and, on oral motion of the United States Attorney, count 3 of the December 1942 indictment was dismissed (R. 8, 9).

On July 10, 1943, a second indictment in eight counts was returned against petitioner charging violations of the Marihuana Tax Act of 1937 (R. 9–13). Counts 1 and 5 of this indictment charged, respectively, the same unlawful sales of marihuana to Groff as had been charged in counts 1 and 2 of the earlier indictment (R. 10, 12; cf. R. 3–4). The remaining counts were eliminated on demurrer, on motion for acquital, or on the Government's motion to dismiss (R. 17, 27, 60–61). After a jury trial, petitioner was found guilty on counts 1 and 5 (R. 27, 33), and he was sentenced on July 12, 1946, to imprisonment for a period of from one to three years (R. 32, 33). On appeal to the United States Court of Appeals for the District of Columbia, the conviction was affirmed (R. 66).

ARGUMENT

Petitioner contends that "Since jeopardy attached when his sentence was imposed and his service began [on the December 1942 indictment], his subsequent conviction for the transactions cov-

ered by those counts of the first indictment, which were *nolle prossed* by the prosecutor, which action was inextricably associated with his plea of guilty, constituted double jeopardy under the Fifth Amendment of the Constitution" (Pet. 5).[1]

Preliminarily, it should be noted that except for the asserted relevance and effect of the "in-

[1] Petitioner also urges that his 27 days of service under the commitment on his plea of guilty to count 3 of the 1942 indictment "divested the trial court of its jurisdiction, over [his] objection, to arbitrarily vacate the judgment" (Pet. 5). That contention, even if it were sound, has no bearing on the jurisdiction of the district court to try him on the 1943 indictment. Its sole relevance is to the question of double jeopardy which is discussed in the text. *United States* v. *Benz*, 282 U. S. 304, 307; *Oxman* v. *United States*, 148 F. 2d 750, 753 (C. C. A. 8), certiorari denied, 325 U. S. 887. However, the district court clearly had authority on July 1, 1943, to vacate the sentence on count 3 of the 1942 indictment, notwithstanding the fact that petitioner had commenced service thereof, since its order was made within term (see R. 9). *United States* v. *Benz* and *Oxman* v. *United States*, *supra; Basset* v. *United States*, 9 Wall. 38, 41; *Frankel* v. *United States*, 131 F. 2d 756, 758 (C. C. A. 6). Even after term, such an order would have been proper if the judgment was void for failure of the indictment to charge an offense. *Mossew* v. *United States*, 266 Fed. 18 (C. C. A. 2); cf. *Bowen* v. *United States*, 134 F. 2d 845, 846 (C. C. A. 5), certiorari denied, 319 U. S. 764. While the record is silent as to the reason for this action of the district court, we have been advised by the United States Attorney that the court concluded that count 3 did not charge an offense. That conclusion seems sound, for count 3 charged unlawful possession of marihuana without retaining the order form required by law, whereas the gist of the offense under Section 2593 (a) of the Internal Revenue Code, under which count 3 was apparently drawn, is the acquisition of marihuana without payment of the required transfer tax.

extricable association" between the plea of guilty to count 3 and the *nolle prosequi* as to counts 1 and 2 of the 1942 indictment, no question of double jeopardy could possibly be involved. Counts 1 and 2 not only related to different transactions than count 3, but they were founded on a criminal prohibition set forth in a different section of the Marihuana Tax Act. Consequently, separate indictment and sentences for the offenses charged in those counts would not be constitutionally inhibited. *Blockburger* v. *United States,* 284 U. S. 299, 301–302, 304. Moreover, since it does not appear that petitioner was ever put to trial on counts 1 and 2 of the 1942 indictment or that a jury had been sworn or evidence taken (see R. 5, 9), the situation falls within the settled rule that reindictment and trial on criminal charges which were previously *nolle prossed* before jeopardy had attached does not constitute second jeopardy under the Fifth Amendment. See e. g., *United States* v. *Fox,* 130 F. 2d 56, 58 (C. C. A. 3), certiorari denied, 317 U. S. 666; *District of Columbia* v. *Buckley,* 128 F. 2d 17, 20 (App. D. C.), certiorari denied, 317 U. S. 658; *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642 (C. C. A. 10), certiorari denied, 299 U. S. 610; *Buie* v. *United States,* 76 F. 2d 848, 849 (C. C. A. 5), certiorari denied, 296 U. S. 585.

The only question here, therefore, is whether the otherwise constitutional propriety of peti-

tioner's reindictment and conviction is affected by reason of the asserted "inextricable association" of the *nolle prosequi* and his guilty plea. Articulation of why that association should render the general rule inapplicable is lacking. Petitioner's contention may be bottomed on the theory that jeopardy attached on all counts of the 1942 indictment when, on his plea of guilty to count 3, he was convicted and sentenced and counts 1 and 2 were *nolle prossed* (see Pet. 7). However, as we have noted, petitioner had not been put to trial on counts 1 and 2 so that under established conceptions jeopardy had not attached on those counts prior to their dismissal. See, e. g., *Bassing* v. *Cady,* 208 U. S. 386, 391–392; *McCarthy* v. *Zerbst, supra; Sanford* v. *Robbins,* 115 F. 2d 435 (C. C. A. 5), certiorari denied, 312 U. S. 697. The mere fact that these counts were not dismissed until after petitioner's plea and conviction on count 3 did not change the picture. The plea and conviction were in terms confined to count 3 (see R. 5–6). Consequently, they could not affect the status of counts 1 and 2, for the law is that "Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States,* 284 U. S. 390, 393.

For the same reasons, reindictment and prosecution for the offenses described in counts 1 and 2 of the 1942 indictment was not constitutionally barred even if it be assumed that petitioner's

plea to count 3 was induced by a promise or understanding that he would not be prosecuted for those offenses. Such a circumstance would not alter the fact, upon which application of the constitutional proscription turns, that jeopardy had not attached in the proceedings on the 1942 indictment with respect to counts 1 and 2. In any event, no such promise or understanding is shown by the record. And even if it were, it would not be binding nor estop the Government from proceeding anew on those charges. *District of Columbia* v. *Buckley, supra; Buie* v. *United States*, supra.

CONCLUSION

The judgment below is clearly correct and the petition for a writ of certiorari is without merit. We respectfully submit, therefore, that the petition should be denied.

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APRIL 1947.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1138.

JACK HENSLEY, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING UNDER REVISED RULE 33 OF THIS AMENDED PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, TO PROVIDE PETITIONER FULL ASSISTANCE OF COUNSEL REQUIRED IN THIS CRIMINAL CAUSE BY THE SIXTH AMENDMENT.

AND INVITATION TO HON. SOLICITOR GENERAL TO CONSIDER CONFESSION OF SPECIFIC ERROR HEREIN INDICATED.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CONSTITUTIONAL QUESTIONS.

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AND INVITATION TO HON. SOLICITOR GENERAL TO CONSIDER CONFESSION OF SPECIFIC ERROR HEREIN INDICATED.

1. The petitioner, Jack Hensley, prays that he be afforded full assistance of counsel in this criminal cause (6th Amdt.) by the granting of this petition for rehearing under the Revised Rule 33, of this amended petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia which amended petition corrects substantial prejudicial matters

inadvertently appearing in the original due to the serious illness of the petitioner's present counsel from which he is recovering slowly due to his age of 75 (whose appearance was filed in the Court below but hence not on the brief nor earlier herein (R. 64)); the judgment affirmed petitioner's conviction for unlawful possession of marihuana under the Marihuana Tax Act of 1937, as re-enacted in the Internal Revenue Code, 26 U. S. C. A. 2591, 2593.

OPINION BELOW.

2. The opinion herein of the Court below is as yet unreported but appears in full in R. 64.

JURISDICTION.

3. The judgment of the Court of Appeals was entered February 10, 1942 (R. 66), and a petition for rehearing (R. 67-69) was denied February 19, 1947 (R. 69). The petition for a writ of certiorari was filed March 18, 1947 and denied April 5, 1947; this petition being filed pursuant to Rule 33, under which, and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935); also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

4. The statutes involved in the deprivation of (a) appellant's liberty without due process of law, and his deprivation of the equal protection of the law, and; (b) appellant being compelled directly and indirectly in this criminal cause to be a witness against himself; and (c) by the usurpation of the federal authorities of powers not delegated to the United States by the Constitution, nor prohibited by it to the States, and which consequently are reserved to the States respectfully, or to the people, in the accomplishment of said deprivation (a); and (d) and the constitutionality of the statutes involved herein which purport to authorize the herein complained of deprivations, is

considerately challenged as a whole, as well as upon several particular circumstances prejudicial to the public interests, and appellant's private rights; which violations (a) violates appellant's rights and privileges under the 5th and 6th amdts.; (b) violations substantially impaired appellant's rights under the 4th and 5th Amdts., in which Boyd U. S. 116, U. S. 616, 618, widely cited and approved, sustained appellant's such contention; (c) discloses the violation of the 10th Amdt. to the substantial prejudice of the public and the appellant's private rights, including (e) being compelled to create, and contribute to the creation, of written and coroborating evidence of possible criminal liability at any time or in essential steps, and required by the statutes involved herein to be compelled to obtain a stated order form before appellant or any one may lawfully gather a volunteer product of our soil because such gathering requires severance from the soil of the volunteer growing marihuana; which severence comes within the term "transferee", (the evidence herein not definitely showing any otherwise acquirements of appellant); and (f) the statutes herein involved clearly violate the 10th Amdt. by requiring the exercise of federal power, enforced by crimes prosecution, to take property for public use without just compensation, in violation of the 5th Amdt.; (g) appellant's arrest and unreasonable search of his house, and unlawful and unreasonable seizure of his said property in violation of the 4th Amdt., in lieu of the just compensation for the taking (f) of his private property prohibited by the 5th Amdt., with this serious protracted prosecution of appellant, comprises violation of 8th Amdt., "cruel and unusual punishment inflicted", upon appellant by and incident to the exercise by the Federal Government of powers prohibited to the Federal Government by the Constitution which vests such powers "in the States respectfully, or to the people" (10th Amdt.), which exercise by the Federal Government is in violation of appellant's rights under the 8th and 10th Amdts.; and (h) since only a relatively few of our citizens may obtain "order form", is

not the statutes involved herein class legislation by Congress without power to enter and control territory and its growth violative of the prohibition against class legislation as well as in violation of the 10th Amdt.; any such exercise being unlawful and arbitrarily inherent may be ruthlessly exercised typical to the control of soil production with the ultimate liability of regimenting producers of the soil of our States by will of Congress, or any other power beyond the direct control of our States, of their respective soils and production.

INVITATION TO THE HONORABLE SOLICITOR GENERAL TO CONSIDER THE CONFESSION AT LEAST OF SPECIFIC ERROR HEREIN.

5. Under the authority of *Young* v. *United States*, 315 U. S. 257, 258-9, 62 S. Ct. 510, 511 86 L.ed 832, 834 the Honorable Solicitor General is hereby considerately invited to consider the confession at least of the specific error herein which is indicated in this petition for rehearing. Such consideration, in view of said authority, is deemed to comprise an element of due process of law under the provision of the Fifth Amendment.

STATUTES INVOLVED.

6. The Marihuana Tax Act of 1937, as re-enacted in the Internal Revenue Code, 26 U. S. C. A. provides in pertinent part:

> 2591. Order forms.
>
> (a) General Requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred on a form to be issued in blank for that purpose by the Secretary.
>
> • • • • • • • • • •

2593. Unlawful possession.

(a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

STATEMENT.

7. Marihuana is a volunteer growth of our soil in the environment of Washington, D. C. as well as in many of our States. It may fairly be said that such was the limited supply of appellant, since the evidence discloses no other source of his supply.

The Department of Agriculture formerly published pamphlets on marihuana's volunteer and other growths, but the Narcotic Bureau of the Federal Treasury Department sometime ago coerced such agriculture authorities to desist making such pamphlets publicly available.

The repeal of our Constitutional Amendment against intoxicating liquor as a beverage is a substantial indication against the practice of law enforcement of human restrictions; but we need not in this cause enter such realm except to consider that such enforcement had the backing of a constitutional amendment to support the same, while marihuana law enforcement by Federal authority is so lawless, arbitrary and reckless that it apparently forgets our federal Constitution and its age old safeguards of the rights of our people; and seems to hark back to the dark ages when all books of learning were forbidden to the people, and only opened for limited times under the clank

of its securing chains and locks to limited public inspection at a few ceremonies in which the glint and glitter of arms and jewels mingled with knightly plumes and gorgeous costumes.

EXCEPTIONAL REASONS FOR GRANTING THIS REHEARING WRIT PRESENTING SOLELY CONSTITUTIONAL GROUNDS OTHER THAN DOUBLE JEOPARDY.

8. The exceptional reasons comprise the serious illness of his present aged counsel approaching at the time of the entrance of his appearance in this cause in the Court below, and not abating to the extent that his physician would permit his performance of the necessary professional work herein until after the time of the filing herein of the petition for the writ of certiorari.

These reasons appear concisely stated in paragraph 4 hereof under the heading, "Questions Presented".

A. The initial authority presented hereunder is *Boyd* v. *United States*, 116, U. S. 616, 618 (6 S. Ct. 524, 29 L. ed. 46). This authority involves a quite similar situation to the case at bar in that it was a tax case involving importation of glass. The statute involved therein provided in part and substance that the District Attorney may obtain an order of Court requiring the importer to produce the invoice of the imported goods, and that if not produced that such failure of production will warrant the Court in proceeding to take as confessed the allegations which such order affirmed (on the authority of the District Attorney) would be disclosed by such production.

In that case say the Court:

> " . . . As the question raised is not only an important one in the determination of the present case, but is a very grave question of constitutional law, involving the personal security, the privileges, and immunities of the citizens, we will set forth the order at large. .... (p. 621) ....

> The clauses of the Constitution to which it is contended that class of laws are repugnant are the Fourth and Fifth Amendments. ... (speaking of said Act requiring the production of said invoice, further says the Court) ...; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. And this is (p. 622) tantamount to compelling their production; ...
>
> It is true that certain aggravating incidents of actual search and seizure, such as forcibly entering into a man's house and searching amongst his papers are wanting, and to that extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplished the substantial objection of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is the natural ingredients, and affects the sole object and purpose of search and seizure. ..."

The statutes involved in the cause at bar are far harsher than that in *Boyd* v. *United States*, *supra*, in the severity of the consequences which their purported presumptions cast upon a person. The latter only may result in imposing a heavier tax, forfeiture or somewhat minor offense; while the former may result in a $2,000. fine, or five years imprisonment, or both; that imposed upon appellant by said unconstitutional violation of the 4th and 5th Amendments enforced by the statutes involved herein. Such violation unquestionably forced the jury to finding appellant guilty. It is a travesty on American justice to contend that appellant had a fair and impartial trial, before an impartial jury, required by the 6th Amendment. Such violation of the 4th and 5th Amendments, unquestionably transformed the jury into a partial jury. The supervisory powers of this Honorable Court over the administration of criminal justice in the subordinate Courts warrants reversal herein.

In *Clawans* v. *Rives*, 70 App. D. C. 107, 104 F. 2d 240, that Court adopted a holding of this Court in 131 U. S. 184-5 that:

> "In the present case, the sentence given was beyond the jurisdiction of the Court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction."

In *Byars* v. *United States*, 273 U. S. at 28 say this Court:

> "... the courts must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' Boyd v. United States, 116 U. S. 616; Gouled v. United States, supra, p. 304 (65 L. ed. 650, 41 Sup. Ct. Rep. 261)...."

Note that *Boyd* v. *United States* is extensively quoted from somewhat above.

In *Glasser* v. *U. S.*, 315 U. S. 60, 67, say this Court;—

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt. * * * p. 69) * * * The Guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. * * *
>
> Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * *"

Such duty included, obviously, the following of *Boyd* v. *U. S., supra*, in striking down the violation of the 4th and

5th Amdts. unlawfully embodied in the statutes herein involved; which authority has so long been followed in many instances disclosed by the Citator; and which violations in the case at bar clearly "provided the * * * impetus which swung the scales toward guilt", *Glasser* v. *U. S., supra.*

That *Boyd* v. *United States, supra,* is applicable to the cause at bar clearly appears in 26 U. S. C. A. 2591 declaring it "unlawful * * * to transfer marihuana, except in pursuance of a written order" (described) and that sec. 2593 ordering that upon "proof that a person shall have had in his possession any marihuana and shall have failed after reasonable notice and demand by the collector, to produce the order form required by sec. 2591 to be retained by him, would be presumptive evidence of guilt" of crime * * * "and of liability for the tax * * *". Such is the type of 'evidence' of appellant's guilt, extorted by the statutes involved, was the unlawful and unconstitutional cause of the finding of guilt by the jury.

Under *Boyd* v. *United States, supra,* as well as a casual statement of the substance of the statutes involved herein, appeal potentially for a reversal herein in furtherance of the age-old prevalency of American justice of the typical type, to which the late Justice Butler, referred in *United States* v. *Motlow,* 10 F. 2d 657, 662, held while sitting on circuit that "abhorrence, however great, of persistent and menancing crime will not excuse transgressions in the Courts of the legal rights of the worst offenders." Of his many decisions this was made a typical part of due official proceedings in his memory.

B. An authority collaterally supporting *Boyd* v. *United States, supra,* is *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401, say the Court:

> "* * * If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Sec. 1. * * * If opium is

> produced in any of the States obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. United States *v.* de Witt, 9 Wall., '41 * * *. The foregoing consideration gains some additional force from the penalty imposed by Sec. 9 upon any person who violates any of the requirements of the Act. It is a fine of not more than $2,000, or imprisonment for not more than (p. 402) 5 years, or both, in the discretion of the Court. Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large portion of the citizens who have some preparation of opium in their possession criminal, or at least *prima facie* criminal, and subject to the serious punishment made possible by Sec. 9. * * *"

It is thus apparent that a very high, as well as persuasive, condition is necessary to convince this Court that Congress intended to violate the 10th Amendment in the enactment of the statutes involved herein as well as that quite persuasive evidence was necessary in all respects in the proof tending to show guilt.

C. That such evidence is wholly lacking herein, seems apparent from the fact that the statutes herein involved, Sec. 2591 making it "* * * unlawful * * * to transfer marihuana, except in pursuance of a written order * * * from to be issued in blank for that purpose by the Secretary" * * * of the Federal Treasury; and in Sec. 2593 making it "* * * unlawful for any person who is a transferee" * * *.

Applying these typical provisions to the marihuana growing in our fields in many of our States, and to the appellant who possesses it is not proven to have been obtained from any source, and must be presumed to have been from such grown marihuana. Applying such term "transferee" to appellant can thus be construed as appellant being the transferee thereof upon its severance from American soil on which it was grown in the States, or any one of them.

To hold that appellant, or any other American citizen, could not lawfully become the transferee of any product of our soil without having first obtained the order form "issued in blank for that purpose by the Secretary", would be the gravest Federal regimentation of State activities "reserved to the States respectfully or to the people" by the 10th Amendment. This is typical of many other evidence of the lack of the intent of Congress in this respect.

D. Further collateral support of *Boyd* v. *United States, supra,* bearing upon the "form to be issued in blank" of Sec. 2591, and upon "* * * having failed, after reasonable notice and demand by the Collector to produce the order form * * *" is *Burck* v. *Taylor,* 152 U. S. 634, 654, 14 S. Ct. 696, 38 L. ed. 578, where the court says at 654:

> "* * * They had a right to rely upon the law * * *, and were not bound by any constructive notice other than those laws provide. If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means of constructive notice. * * *"

This authority dos not warrant that in the enactment of the statutes involved herein Congress had any intention to provide for the lawful compelling of a witness to testify, or to produce evidence, against himself in a criminal cause relative state occurrences condemned in the Fourth and Fifth Amendments as well as by this Court in *Boyd* v. *United States, supra.*

E. If the Statutes Involved herein have any constitutionality in the case at bar, which is considerately and seriously denied, with the many grave constitutional settings hereinbefore and in paragraph 4, "Questions Presented", supplemented in subsequent paragraphs hereof, attention is invited to the fact most pertinently stated in Sec. 2591 in effect that transfer of marihuana "in pursuance of a written order * * * on a form to be issued in blank for that pur-

pose by the Secretary'' is not a crime and that the ''reasonable notice and demand'' specified in Sec. 2593 for such ''order form'' is an essential prerequisite to the fonndation of even probable cause for belief that a crime has been committed. The record shows that no such ''notice and demand'' was ever made until almost two years after his first arrest followed by the first indictment, or was notice attempted until long after the second indictment and arrest herein; and that such failure negatives probable cause for each arrest, as well as each indictment. Arrest and indictment without probable cause evidenced by the notice and demand, required by said sec. 2593 is void, as are the indictments herein which disclose no such notice and failure; and each such indictment violate the 6th Amdt. by failing to ''inform(ed the appellant) of the nature and cause of the accusation;'' this is obviously true because reasonable production of the order form would negative violation such statutes.

In the course of the trial, Deputy Collector of the Internal Revenue Clarke testified (Tr. 45) (the left numbering 121, 122, 123) that the purported demand was written and dated April 17, 1944, which is in the form of a letter addressed to "Jack Hensley or (Housley) 2314 1st St., N. W.," the original of which is in possession of appellant's counsel and temporarily tendered to the clerk for inspection that maybe desired. The pages of the original transcript from 126 to 130 disclose that the said letter being mailed to the address above stated was the only purported notice and demand made upon appellant which was not personally served, as required by **Burck v. Taylor, supra.** This was not the type of notice which ''was essential to charge them, actual notice should have been given'', *Burck* v. *Taylor, supra.* With the lack of personal service, it cannot be reasonably said, and was not proved by evidence beyond reasonable doubt, that appellant had no required ''order form''. If that had been a fact, the same could have been proven by the Internal Revenue Officers that appellant had

not applied for such forms, or had previously used all such forms he had applied for and obtained. It seems significant that no such evidence was forthcoming when it was within the ability of appellee to produce the same. Considerations of the character of evidence within the ability of the Narcotic Officers to produce, leads to the inescapable conclusion that the notice and demand required by the statute has no practical utility except to violate the Constitutional rights of citizens, including the 4th and 5th Amdts., and thereby invites indolence of such officers, because the records of their office disclose who have and who have not the stated orders forms which cannot be used except by the one officially receiving same.

Nigro v. *United States,* 276 U. S. 332 is a five to four decision with a narcotic violation in morphine which is not produced in the United States as the product of any growth of the soil of any of the United States and considerations of *Boyd* v. *United States, supra,* were not embraced within that opinion; nor was the manner of service of the order form specified in the statutes involved herein considered in such or other cause by this Court including the manner of service of a "notice * * * essential to charge" one of crime, indicated in *Burck* v. *Taylor, supra,* considered relative to this statute involved herein.

In the case at bar appellant was denied the equal protection of the law, which is an integral part of due process of law without which no one accused of crime may be lawfully deprived of his liberty. Said equal protection was afforded the accused in criminal cause No. 69,229 *U. S.* v. *Sidney Foster,* a marihuana case which was disposed of on the ground that the statutory required notice and demand must be made before the accused was charged and indicted.

The other elements of the "Questions Presented" are rendered clear and definite by the provisions of the constitution which from their settings, both factually and legally; therefore they seem to require no further specific

explanations of their applicability other than those afforded by their context.

CERTIFICATE OF COUNSEL.

9. Appellant's counsel considerately certifies to this Honorable Court that this petition for rehearing embraces exceptional reasons for the granting thereof which are of merit and substance in furtherance of the clarification of the law, and of public confidence in the administration of the law, and that same is presented in good faith and not for delay.

CONCLUSION.

10. The foregoing is presented to this Honorable Court by a member of long standing of its bar whose age and experience presents nothing which he does not deem worthy and meriting judicial clarification in furtherance of the law and of public confidence in its administration.

WHEREFORE, it is respectfully submitted that this petition for rehearing of this amended petition for writ of certiorari, founded only upon Constitutional settings of substance important to the public, as well as to the petitioner herein, and that the same may be graned; or at least that the same may be passed upon without prejudice to the right of the accused to independently hereof have determination of the rights hereinbefore stated, and other constitutional questions, in duly seeking relief from any and all such claimed deprivations of his liberty in and incident to the proceedings in this cause.

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Counsel for Petitioner.